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No. 57523-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARTIN SCHNALL, et al.,

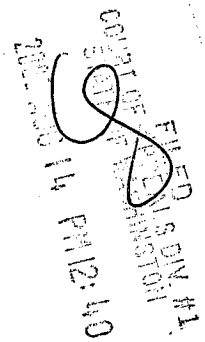
Petitioners,

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

BRIEF OF RESPONDENT AND CROSS-APPELLANT



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I. INTRODUCTION

Appellants' Opening Brief ("App. Br.") greatly overstates the effect of the Order Denying Class Certification. The trial court's reasoning will not prevent certification of a Washington Consumer Protection Act ("CPA") class action in a proper case, but it recognizes that not every CPA case is appropriate for class treatment. The trial court quite properly undertook a rigorous analysis of the claims and evidence *in this case* and concluded that the claims present individual issues that predominate over the issues that are common to the class. In addition, the task of sorting out and applying the appropriate laws of fifty different states would overwhelm any common issues and render the proposed class unmanageable.

Appellants ("Plaintiffs") paint an oversimplified and misleading picture, in which all customers supposedly responded to the same form of price advertising only to be surprised by an undisclosed charge on their bills. This simply ignores the substantial evidentiary record that was submitted by AT&T Wireless Services, Inc. ("AWS")[1] in opposition to Plaintiffs' motion for class certification. In fact, there is no evidence that any of the Named Plaintiffs saw any particular advertisement for AWS service or was misled by an advertised price. The record is clear that many advertisements do not even mention the monthly access fee. When

[1] On October 26, 2004, Cingular Wireless LLC completed its merger with AT&T Wireless Services, Inc., which was renamed New Cingular Wireless Services, Inc. and is now a wholly-owned subsidiary of Cingular Wireless LLC. Because "AT&T Wireless" as such no longer exists, it and its practices are referred to in the past tense.

monthly fees are mentioned, the advertisements also disclose that other charges, surcharges and taxes apply. *See* § II.D.2, *infra.*

Moreover, as the trial court found, AWS customers agreed in their Subscriber Agreements that they were responsible for "any taxes, surcharges, fees, assessments, or recoveries imposed on [the subscriber] or [AWS] as a result of use of the service[.]" CP 418. The Universal Connectivity Charge ("UCC") is a government assessment imposed on wireless carriers to help fund public services; clearly it is covered by the Agreements. The trial court further found that "[s]ome agreements, advertising and promotional materials were more explicit" and expressly identified the "universal connectivity charge" as one of the fees, taxes and surcharges for which the consumer was responsible. *Id.* The Agreements allow AWS customers to cancel their service without penalty within the first 30 days of service, during which time the subscriber will typically receive a bill. CP 3120-21. Because the UCC appeared as a separate line item on that first bill (and every one that followed), any subscriber who was surprised by the charge had the opportunity to cancel service. CP 3121; *see also, e.g.*, CP 3490. But at least four of the five original Named Plaintiffs paid their bills, including the UCC, without question or protest for months or even years. CP 419.

Although the UCC was one of many taxes, surcharges and fees imposed on wireless carriers and passed through to subscribers, AWS singled out the UCC and provided a detailed description of the charge in disclosures to all subscribers in early 1998, when the UCC was added to

subscriber bills, later in 1998, and again in 2000. CP 3396-98. Through these and many other sources described in the record, subscribers had access to complete and accurate information regarding the UCC from AWS and from a variety of other sources. *See* §§ II.D, II.E, *infra*.

This is not a case in which material information was uniformly misstated or suppressed, or in which one can infer that all consumers who bought the product must have been misled. Instead, the evidence shows that AWS subscribers had access to accurate information about the UCC and the vast majority understood their Subscriber Agreement required them to pay taxes, surcharges and other government-imposed fees, such as the UCC. Judge North was very familiar with the claims and evidence in this case. He was well within his discretion to decide that individual questions in this case predominate over common questions, and that a class-wide trial of the claims would be unmanageable.

II. ASSIGNMENT OF ERROR AS TO CROSS APPEAL

The trial court erroneously denied AWS' Motion for Summary Judgment to dismiss Mr. Schnall's claims based on the Washington CPA.

Issue pertaining to assignment of error: Does Washington's CPA apply to claims of misrepresentation where any reliance by Plaintiff on alleged misrepresentations occurred in New Jersey when he entered a contract to be performed in New York that chose New York law?

III. STATEMENT OF THE CASE

AWS, through a number of affiliates and subsidiaries, offered

wireless services to the public under the "AT&T Wireless" trade name.[2] Between March 3, 1998 and February 1, 2003, AWS served a fluid customer base that ranged in size from 6 million to 21 million customers. CP 3203-04. Plaintiffs seek to establish, by means of a class action, that *all* AWS customers were materially deceived as to the nature of the UCC, and that *all* of the various forms of AWS subscriber agreements prohibited collection of the charge. AWS strongly disputes both points. In light of the facts as outlined below, it is not possible to resolve such claims fairly on a class-wide basis.

A. The Federal Universal Service Fund And The UCC

The Telecommunications Act of 1996, 47 U.S.C. § 254(d), created the federal Universal Service Fund ("USF") and empowered the Federal Communications Commission ("FCC") to collect "contributions" to the fund from interstate telecommunications providers. The USF supports programs that provide subsidized telephone and Internet services to rural and low income areas, as well as to public facilities such as hospitals and schools.[3] The FCC requires wireless and landline carriers to pay into the USF based on a percentage of their interstate revenues. *Id.*

The decision to impose USF charges on carriers was very controversial and the impact on consumers generated extensive discussion

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[2] CP 4060. These affiliated companies held the FCC licenses for wireless spectrum in various markets across the country. *Id.* "AWS" in this brief refers to AT&T Wireless Services, Inc. and its subsidiaries and affiliates that provided service to and entered into contracts with subscribers.

[3] *See* 47 U.S.C. § 254; *In ref Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776 (1997).

within the FCC.[4] Some Commissioners strongly believed that the carriers should be *required* to label their USF contributions as a line-item "tax" on customer bills, for public policy reasons. As then-Commissioner Furchgott-Roth explained:

> Line items for new taxes are a means of letting customers understand why rates are not lower than they would have been absent new taxes. These line items are not a means of promoting "hidden rate increases," as some have called it. To the contrary, the only "hidden rate increases" are those that result from obscured and unexplained taxes.

Id. In this view, line-item charges such as the UCC serve a salutary purpose by informing customers that their wireless telephone bills include the cost of government programs. *Id.* After lengthy debate, the FCC decided to "permit" (but not "require") carriers to recover USF contributions through a separate line item charge on customers' bills.[5] This decision by the FCC preempts any state action that would have the effect of prohibiting the use of line item charges to pass the USF through to subscribers.[6]

B. AWS' Implementation of the UCC

When the FCC began the Universal Service program, AWS took steps to educate customers and to implement the charge. CP 3394-95.

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[4] *See In re Truth-in-Billing and Billing Format*, 14 F.C.C.R. 7492 at ¶¶ 53-54 n.144, 151 (1999).

[5] *See, e.g., In re Federal-State Joint Bd. on Universal Serv., Twenty-First Order on Recommendation*, 15 F.C.C.R. 12,050 at ¶ 3 (2000).

[6] *In re Truth-in-Billing and Billing Format, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 6448 at ¶¶ 30-32 (2005).

Following the lead of its parent company at the time (AT&T Corp.), it chose the term "Universal Connectivity Charge," which is a phrase commonly used by carriers to describe the USF charge. In fact, the FCC uses this term on the "Sample Wireless Phone Bill" posted on the FCC website. *Id.*; *see also* CP 3378-80.

AWS' objective with respect to the UCC has always been to recover the amount of its required contributions to the USF, and no more. CP 3394-95. AWS does not retain any premium, or administrative or handling fee, and realizes no windfall from this charge.[7] The task of predicting USF payments is complicated, given the FCC's methods of calculating contributions and the fact that the FCC periodically changes its assessments. CP 3394. As the FCC's procedures for setting contribution levels and collecting USF contributions have evolved over time, so has AWS' system for setting and collecting the UCC from customers. Initially, in February 1998, AWS established a flat fee of 65¢ per month per subscriber, based on the FCC's predictions regarding the amount it would require AWS affiliates to contribute to the USF. CP 3397, 3476. The UCC flat fee fluctuated from time to time as the FCC changed the amount of the contribution required from AWS. In August 2000, as allowed by the FCC, AWS began to charge for the UCC based on a percentage of the subscriber's monthly phone usage, rather than a flat fee. CP 3398-3489. AWS periodically sent detailed notices to its subscribers explaining the

[7] *Id.* Plaintiffs imply that AWS collected more from subscribers than it contributed to the USF. *See* App. Br. 4-5. This is not true. *See* CP 3394-95.

UCC and describing changes to it. CP 3396-98, 3475, 3484, 3489.

C. AWS Subscriber Agreements Always Provided That The Customer Was Responsible For Charges Like The UCC

The Subscriber Agreements in use during the putative class period varied in numerous respects, but all of the Agreements provided that the customer was responsible for various types of charges in addition to the monthly fee—whether those charges were imposed on AWS or on the customer. CP 418. For example, named Plaintiff Schnall's Agreement provided:

> You are responsible for paying all charges to your account, including but not limited to . . . any taxes, surcharges, fees, assessments, or recoveries imposed on you or us as a result of use of the Service[.]

CP 763; *see also* CP 3510-11 for other examples of applicable Subscriber Agreement language used by AWS.

Furthermore, contrary to Plaintiffs' assertions, beginning as early as 1999, many AWS customers received rate plan materials (incorporated as part of their Subscriber Agreements) that listed the "universal connectivity charge" as among the taxes, surcharges, and fees for which the customer was responsible. *See, e.g.*, CP 3515-3516, 3236. It is not surprising that the vast majority of AWS' subscribers, including the named Plaintiffs in this litigation, understood that they were obligated to pay the line item charges on their bills—including the UCC.

Plaintiffs argued to the trial court that AWS could not pass through the UCC unless it was specifically identified in every Subscriber Agreement. This argument is wrong as a matter of law because the UCC

clearly is included in the categories (tax, surcharge, charge and/or fee) that were among the contractual obligations of subscribers under the Agreements. Indeed, in light of the wide variety of taxes, surcharges, fees, assessments and other charges imposed on wireless carriers and their subscribers by federal, state, and local governments, it is completely impractical to list each one specifically on each Subscriber Agreement. *See* CP 4056-57, 4063-4239 (identifying 391 different taxes imposed on telecommunications vendors and their customers); CP 4057, 4241 (listing types of charges). Charges of this nature come and go at the whim of the government and the amounts (as in the case of the UCC) vary over time. It simply is not possible to provide every customer with pre-printed literature specifying in detail the nature and amount of every prospective tax, fee or charge that will appear on his or her account during the term of the agreement. CP 3511-12; *see also* CP 3120.[8]

D. AWS Took Reasonable Steps To Inform Customers Of Their Obligations Regarding The UCC

Although its Subscriber Agreements provided that subscribers were responsible for the UCC, AWS nonetheless took additional steps, both before and after the UCC was adopted, to inform its current and

[8] Nor is it practical or equitable to insist that wireless carriers simply incorporate such charges into their monthly calling plan rates. Line-item charges serve the important function of informing consumers as to the reasons for increased costs of service, and allow them to express their views on the subject to elected officials. CP 4057-58. Further, because these charges vary from jurisdiction to jurisdiction, incorporating them into carriers' flat rates would be inequitable to consumers – as it would cause customers in some jurisdictions to subsidize the programs and initiatives of others. CP 4059. In any event, the FCC has ruled that wireless carriers may use line items to pass this charge through to subscribers and this decision preempts any state law to the contrary. 20 F.C.C.R. 6448 at ¶¶ 30-32 (2005).

potential subscribers of their obligations.

1. Billing disclosures.

When the UCC was adopted in 1998, notice was provided to all subscribers on their next monthly bill. CP 3396-97, 3475. As the amount of the UCC charge changed over time due to fluctuations in the "contributions" demanded from AWS, updates were mailed to subscribers. CP 3484, 3489.

Each AWS customer also received a monthly billing statement that set forth a detailed list of all the charges on his account. For example, each of the named Plaintiffs received bills that listed the UCC as a line item (*see, e.g.,* CP 3459, 3470, 3476.). Each paid this charge without protest or question, at least until he was contacted by lawyers.[9]

Contrary to Plaintiffs' arguments, AWS did not misrepresent the nature of the UCC to customers on their bills. The UCC has always been identified as a line-item "charge" on the bills, rather than as a "tax." *See* CP 3396, 3459, 3470. For a time, the UCC appeared on bills under the heading, "Other Charges and Credits," whereas taxes were listed under a separate heading, "Taxes." *Id.* Subsequently, the UCC resided in a section headed "Taxes, Surcharges, and Regulatory Fees," a label that clearly includes charges other than taxes. *Id.*

2. Advertising disclosures.

As a general rule, printed advertising that made reference to

[9] CP 419, 3314-18. The possible exception is Mr. Schnall who called Customer Care to inquire about the UCC shortly before he terminated service. There is a factual dispute over whether he protested the charge in this call. *See* CP 3314-3316.

service plans and prices also included disclosures that subscribers would be subject to taxes and other charges, in addition to their monthly access. CP 3517. For example, different ads disclosed the following:

- Other charges, surcharges, taxes and ... early cancellation fee per line apply.
- Roaming, additional minute charges, other restrictions, charges, surcharges and taxes apply.
- Sending text message charges, roaming, additional minutes charges, other restrictions, charges, surcharges and taxes also apply.

Id. In addition to these general disclosures, many AT&T Wireless advertisements during the alleged class period included specific reference to the "universal connectivity charge," as among the charges that would be collected. *Id.*[10]

3. Point of sale disclosures.

Plaintiffs also imply that subscribers had no other source of information regarding wireless service until after they committed to a contract. App. Br., p. 1. This is incorrect.

New subscribers signed up for service with AWS through a variety of sales channels, including: (1) AT&T Wireless stores or kiosks; (2) independent "exclusive" retail dealers; (3) independent "non-exclusive"

[10] Plaintiffs imply that all new customers chose AWS as a result of seeing the same type of ad (i.e., one that advertises a monthly access fee). But many AWS ads made no reference to service plans or prices. Many customers saw and responded to advertising regarding service availability, equipment features or models, equipment pricing, call quality or coverage, or other general advertising themes. CP 3140-41. There is no evidence that the Named Plaintiffs, for example, saw any particular advertisement or whether advertisements they might have seen made reference to the UCC.

retail dealers (e.g., Best Buy, Radio Shack), where AWS products are offered competitively with products and services of other wireless carriers; (4) the AT&T Wireless website; (5) other e-commerce vendors, such as amazon.com; (6) negotiated sales through corporate or government contracts; (7) direct mail sales; and (8) telephone sales (by AWS or by third-party vendors). CP 3116.

In all channels, the subscriber received a great deal of information regarding service at the point of sale, and had access to much more information if she desired it. For example, the approximately 30% of new subscribers who purchase services through an AWS retail store had access to sales representatives who were trained to discuss the subscriber's obligations under the Service Agreements and that there would be additional charges on their bills, above and beyond the monthly access charges. CP 3119-20. Sales representatives were also trained to provide an estimated general range of what those charges might be. *Id.* AWS submitted substantial evidence of the various ways in which subscribers could receive information regarding the UCC and other obligations at the point of sale.[11] The point-of-sale experiences of AWS subscribers clearly were not uniform, and the path by which a customer chose AWS significantly affected her purchasing experience.

4. Experiences of renewing customers.

Most AWS transactions did not involve "new" customers, because most customers retained their service beyond the initial term of their

[11] *See* CP 3115-21; 3127-30; 3202-24; 3302-92.

contracts. In fact, the average length of service for an AWS subscriber was about 36 months. CP 3131-32. Existing AT&T Wireless customers were continually renewing their contracts and purchasing new phones and services. *Id.*; *see also* CP 3123 ("as of April 2002, 97% of customers who upgraded their equipment also agreed to a new term of service"). Renewing customers already were aware of the charges on their bills.

5. Customer Care.

AWS had some 10,000 Customer Care representatives ("CC Reps"), who had extensive training to enable them to respond to customer inquiries and concerns. CP 3303, 3306-09. All CC Reps were able to research and respond to customer inquiries by using the Internet, various AWS databases, and "CCNet," a Customer Care intranet that contains links to information on a wide variety of topics. CP 3304-05, 3309-12. CC Reps received training on the UCC when it was introduced in 1998, and thereafter they received periodic training updates to reflect changes in UCC assessments and other matters. CP 3307, 3309; *see also* CP 3098-3114.

Because calls are not recorded, there is no record of what exactly each CC Rep said to each customer who called with questions about the UCC, but the text of model questions and responses in CCNet reflects the types of questions and the proper responses. Thus, if a customer asked why AWS was passing the UCC on to customers, the CC Rep was to respond along the following lines:

AWS generates revenue in the same way any business does

> – from the sale of goods and services to customers. While we support the spirit and the principles of universal service, in the competitive industry we are in, we cannot afford to absorb the costs associated with USF that have been imposed on AWS. Therefore, recovery of our expenses is necessary. As long as AWS is required to by the FCC to make payments into the USF, AWS will assess the Universal Connectivity Charge to recover our costs.

CP 3098, 3101. A senior member of AWS' Customer Care staff testified that he had never received a complaint from a consumer about how the UCC was disclosed to him or her. CP 3313.

E. Other Sources Of Information About The UCC

In addition to all the information provided by AWS, customers had access to numerous other sources for information about the UCC. During the putative class period, most if not all wireless and long distance landline carriers collected similar line item charges and many provided information on their bills or websites about the USF. *See* CP 3874-76, 3990, 3993, 3994-98, 4000, 4006, 4010, 4012-16; *see also* CP 3072-96, 3256-75. Any AWS subscriber that had previously been a customer of one of these other carriers should have been well aware of the UCC.

In addition to the telecommunications industry's efforts to educate customers about the USF and what it means for them, the FCC has created public notices and public education materials on the subject as well. CP 3873, 3878-3937. Many state governments also provide consumers with abundant information about USF-related charges. CP 3873-74, 3939-85.

There also has been significant press coverage concerning the USF and its effect on consumers, particularly during the early years of the

program when the charges generated a great deal of controversy. CP 1211-13, CP 1224-3071. While Named Plaintiff Schnall was receiving service in 1998 and 1999, for example, many articles appeared in newspapers published where he lived and worked (New York City and New Jersey). CP 1212. Relevant articles have run in scores of newspapers all across the country. CP 1212-13.[12]

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Denying Class Certification

Decisions on class certification are left to the discretion of the trial court and may be reversed only on a finding that the court abused that discretion. App. Br., p. 13; *Oda v. State,* 111 Wn. App. 79, 90, 44 P.3d 8 (2002); *Eriks v. Denver,* 118 Wn. 2d 451, 466, 824 P.2d 1207 (1992). A discretionary decision will not be disturbed unless it is based on untenable grounds or is manifestly unreasonable or arbitrary. *Oda,* 111 Wn. App. at 91; *Miller v. Farmer Bros. Co.,* 115 Wn. App. 815, 820, 64 P.3d 49 (2003).

Appellants greatly overstate the impact of the cases that say a decision to certify a class should be reviewed "liberally" and that "close cases" should be resolved in favor of certification. This liberal review does not relieve a Plaintiff of the burden to show that each element of CR 23 is met. "Class actions are specialized types of suits, and as a general

[12] The trial court ruled that these third-party disclosures were not relevant context evidence as to the contract interpretation issue (CP 419), but this evidence certainly is relevant to the question of whether a subscriber understood the nature of the UCC and his obligation to pay it.

rule must be brought and maintained in strict conformity with the requirements of CR 23." *DeFunis v. Odegaard,* 84 Wn. 2d 617, 622, 529 P.2d 438 (1974); *Oda,* 111 Wn. App. at 92. "[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable" and a "rigorous analysis" of the claims and the elements of the Rule is required before a class may be certified. *General Telephone Co. v. Falcon,* 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); *Oda,* 111 Wn. App. at 92.

The basis for the court's denial of class certification was a rigorous and informed analysis of the contract and CPA claims in the case and the evidence that would be admitted to prove or defend those claims. The court determined that the proof required on key issues in the context of *this case* was necessarily individual rather than common. Judge North's decision makes "articulate reference" to the elements of CR 23. CP 417-22. *See Washington Educ. Ass'n v. Shelton School Dist. No. 309,* 93 Wn. 2d 783, 793, 613 P.2d 769 (1980); *Miller,* 115 Wn. App. at 820. The decision was well within his discretion.

B. The Court Properly Exercised Discretion To Deny Class Certification Of The Contract Claims

Having considered more than one motion for summary judgment on Plaintiff's contract claims, the trial court was familiar with these claims even before he reviewed the substantial evidentiary record submitted in opposition to the motion to certify a class. Based on this record, the court identified three significant problems with certifying a class on the contract claims. Any one of these problems, standing alone, was sufficient reason

to deny class certification.

First, because each Plaintiff's contract claim requires application of the law of his or her home state, the need to construe the laws of up to 50 different states makes the proposed class unmanageable. Second, the court already had found Mr. Schnall's Subscriber Agreement ambiguous, so individual inquiry to consider extrinsic evidence is required to resolve the contract claims. This undermines commonality and typicality, and leads to a predominance of individual rather than common questions. Third, choice-of-law issues as well as factual issues on the merits of AWS' affirmative defenses raise issues that cannot effectively be tried on a class-wide basis. CP 418-20.

1. The need to construe the laws of up to 50 different states precludes certification.

a. The Subscriber Agreements contain effective choice-of-law provisions.

Although the language of AWS' Subscriber Agreements varied significantly over time and, in many cases, among different parts of the country, the Agreements generally included a choice-of-law provision. CP 418; 3505-07. The vast majority of these agreements applied the law of the subscribers' state of residence. CP 418.

In some early Subscriber Agreements, the choice-of-law provision identified a particular state by name. For example, Named Plaintiff O'Day's contract provided, "This Agreement shall be governed by and subject to all applicable federal laws (including FCC regulations), the laws of the State of Florida, and by any tariff." CP 3508, 3522. In most cases,

however, the Agreements identified the applicable law by reference to the customer's area code and phone number. For example, the Agreement from July 1999 provided, "This Agreement is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the [phone] Number." CP 3508, 3525.

b. The parties' choice of law is applicable.

The trial court found correctly that Washington courts will enforce a choice-of-law provision in a contract as long as application of the chosen law does not violate any fundamental policy of the forum state. CP 418. Plaintiffs have not attempted to identify any fundamental policy of Washington that would be frustrated by application of the choice-of-law provisions in the Subscriber Agreements.

Instead, Plaintiffs argue that the choice-of-law provision in *Mr. Schnall's* Subscriber Agreement is ineffective because it supposedly invokes unspecified "state laws" as well as the law of the state associated with his phone number. App. Br., pp. 44-45. Plaintiffs say nothing about the millions of other Subscriber Agreements that contain different language. By focusing on the language of Mr. Schnall's Agreement, which does not appear in most AWS Subscriber Agreements, Plaintiffs actually reinforce the court's finding that the choice-of-law determination itself will require individualized factual inquiry that would overwhelm the effort to try the claims as a class.

Moreover, Plaintiffs are wrong even as to Mr. Schnall's Agreement, which merely acknowledges that, in a mobile and highly

regulated industry such as this, a variety of federal and state laws may affect the manner in which wireless services are delivered throughout the nation. Mr. Schnall's Agreement goes on to specify a particular state's law as the default choice of law, i.e., the state that is associated with Mr. Schnall's telephone number.

c. Even if the choice-of-law provision were not enforceable, the law of each customer's home state would apply.

The law of a subscriber's home state is generally applicable to her contract claims because her home state will have the "most significant relationship" with the claims that allegedly arise out of her contract. *Baffin Land Corp. v. Monticello Motor Inn, Inc.,* 70 Wn. 2d 893, 896, 425 P.2d 623 (1967); *G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co.,* 97 Wn. App. 191, 195, 982 P.2d 114 (1999). In deciding which law applies, the court must first evaluate the parties' contacts with each interested jurisdiction, considering which contacts are most significant in light of the claims alleged. *Ito Int'l Corp. v. Prescott, Inc.,* 83 Wn. App. 282, 289, 921 P.2d 566 (1996). The court then considers the interests and public policies of potential interested jurisdictions. *Id.*

Mr. Schnall's case is somewhat unusual in that he chose a phone number for an adjacent state, rather than his home state.[13] But if we look at another putative class member from New York, the flaw in Plaintiffs' argument is apparent. Consumer A is a New York resident who entered a

[13] Because Mr. Schnall lived in New Jersey but had a New York telephone number, there might be an issue of fact that is individual to him as to whether New York or New Jersey law applies. But there certainly is no basis to apply Washington law.

contract for wireless service to be provided primarily in New York. His contract is with a New York partnership that is licensed by the FCC to provide wireless services in New York. *See* CP 755-56. Consumer A chose a New York number and agreed to apply the law of the state associated with his number. *See, e.g.*, CP 764. In these circumstances, the court clearly would apply New York law to Consumer A's breach of contract claim. *See Baffin Land,* 70 Wn. 2d at 896; *G.W. Equipment*, 97 Wn. App. at 195. There is no basis for Washington to apply its law to the claims of millions of subscribers who reside elsewhere.

d. The need to construe and apply the laws of 50 different states makes the proposed class unmanageable.

The court's decision on manageability clearly was not an abuse of discretion. A "court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Most courts have reached the same conclusion. *See, e.g., Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir. 1996); *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1085 (6th Cir. 1996); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1016-17 (D.C. Cir. 1986); *Carroll v. Cellco P'ship,* 713 A.2d 509, 518 (N.J. Super. App. Div. 1998).

Choice of law is a threshold issue in the class certification analysis, for the Court must know "which law will apply *before* it makes its predominance determination" under CR 23(b)(3). *Spence v. Glock*

Ges.m.b.H, 227 F.3d 308, 313 (5th Cir. 2000) (emphasis added). Plaintiffs have the burden to "provide an 'extensive analysis' of state law variations to reveal whether these pose 'insuperable obstacles' to certification." *Id.*, quoting *Walsh*, 807 F.2d at 1017 (D.C. Cir. 1986). No corners can be cut on this analysis, for the parties in a class action have a due process right to have their claims decided under the appropriate law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

The difficulty of conducting a proper choice-of-law analysis for each member of a class that numbers in the tens of millions, scattered across the country, weighs against certification of a nationwide class. Washington courts recognize the need to sort out choice-of-law issues in a nationwide class is a "fatal impediment" to class certification. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 322-23, 54 P.3d 665 (2002). Federal courts likewise have expressed a healthy skepticism with respect to certification of classes that involve the claims of plaintiffs from multiple jurisdictions. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002); *Castano*, 84 F.3d at 741 ("[V]ariations in state law may swamp any common issues"). Indeed, courts are virtually unanimous in holding that substantive variations in the applicable legal standards bar a finding of the predominance and superiority required under CR 23(b)(3). *See In re Bridgestone/Firestone*, 288 F.3d at 1015; *Castano*, 84 F.3d at 741; *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 421 (E.D. La. 1997) ("Differences among state

laws . . . can combine with fact differences among plaintiffs' many claims, making the class model unmanageable and inefficient.").

As explained by Professor Miller:

> Beyond the difficult task of correctly determining foreign law, the nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles. Although the comparison obviously is inexact, one can appreciate the magnitude of the trial judge's task by imagining a first-year law student who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly[.]

Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 64 (1986).

The differences among the state laws that will govern the contract claims here are not minor or superficial, as Plaintiffs argue. App. Br., p. 45. Differences in state law affect the evidence that may be admitted, the arguments that may be advanced, and the jury instructions for each claim. Even where the laws of different states appear to be superficially similar, the nuances in application of those laws will differ. *In re Masonite,* 170 F.R.D. at 422; *Castano*, 84 F.3d at 742 n. 15. As this Court is well aware, the devil is in the details. Substantial disagreements occur every day as to the application of any state's laws. Plaintiffs' conclusory and unsupported arguments that the contract laws of the 50 states are identical in relevant respects fall far short of the "rigorous analysis" required to certify a class, and are contrary to the well-established law on certification of state law

class actions.

2. Extrinsic evidence will be admissible under many states' laws and such evidence creates individual questions of fact that predominate.

Whether and what kind of extrinsic evidence will be considered as to each subscriber's contract claims are threshold questions, the answers to which differ depending on which state's law is applied. Such differences among the 50 states' laws preclude class certification. *Bowers v. Jefferson Pilot Financial Ins. Co.,* 219 F.R.D. 578, 581-83 (E.D. Mich. 2004) (in putative nationwide class action on breach of contract claim involving standardized form contract, class certification was not warranted because of "significant variations in the states' laws with respect to the use of extrinsic evidence"). For example, under New York law (which applies to Mr. Schnall's claims), extrinsic evidence will be admitted only when an ambiguity "appears on the face" of the agreement. *In re Consolidated Mutual Insurance Co.,* 566 N.E. 2d 633, 638 (N.Y. 1990). In Washington, of course, extrinsic evidence is admissible in order to interpret a contract, whether or not the contract is ambiguous. *Berg v. Hudesman,* 115 Wn. 2d 657, 667-68, 801 P.2d 222 (1990).

Applying Washington law, as "illustrative of the issues that would arise," the trial court found that extrinsic evidence was admissible in order to assist in interpreting the meaning of the contracts. CP 418. "In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid[.]" *Berg*, 115 Wn. 2d at 668; *In re Avon Securities Litigation*, 2004 WL 3761563 at *5 (S.D.N.Y.) ("the parties' cause of

performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties").[14] In this case, evidence of subsequent performance by subscribers is particularly compelling. Each of the Named Plaintiffs received monthly bills that included a specific line item for the UCC. Four of the five admit they paid these charges without questioning them throughout the term of their Agreement with AWS. CP 3314-18. Indeed, they only questioned the charge after they were contacted by Plaintiffs' counsel and recruited to be part of the lawsuit. CP 4263-64, 4272, 4275-76, 4288-89, 4301.

Mr. Schnall *may* be the exception that proves the rule. He paid the UCC on his bill for many months without question, although he questioned other line item charges on his bill. CP 3316. But shortly before he terminated service, he made one call to AWS' Customer Care with a question regarding the UCC. The parties dispute whether he protested the charge or whether he was satisfied when he learned what it entailed. CP 3315-16. In a trial on Mr. Schnall's individual contract claim, evidence regarding his voluntary payment of the UCC and his phone calls to Customer Care would be admissible. Similar evidence as to other subscribers' claims clearly is admissible. As the trial court concluded, "individual inquiry would have to be made into these factors for interpretation of the terms and conditions to decide the contract

[14] AWS refers in this section to the laws of various states to illustrate problems that would arise in class-wide litigation of the contract claims. However, as discussed above, there are significant differences among the states in terms of admissibility and the weight of extrinsic evidence in a contract claim.

claims." CP 419.

Plaintiffs misconstrue the purpose of this evidence and mischaracterize the trial court's decision. App. Br., p. 40. The court did not, as Plaintiffs claim, find that disclosure of the UCC changed the terms of the agreement.[15] Instead, the court followed *Berg*'s instruction that the subsequent conduct of the contracting parties is often strong evidence of the way in which they understood the agreement at the time they entered into it. 115 Wn. 2d at 668.

Plaintiffs' argument to this court that "extrinsic evidence is totally irrelevant to determine the meaning of the contract in this case" (App. Br., p. 38) ignores the earlier rulings of the trial court on the contract claims and is also a complete reversal of the position that Plaintiffs took in the trial court. Prior to the class certification decision, AWS had moved for summary judgment on Mr. Schnall's contract claim, based on the language of his subscriber agreement ("taxes, surcharges, and other charges, and fees" are additional). *See* CP 743-54, 755-76. The trial court denied AWS' motion for summary judgment, finding that the interpretation of the contract raised "a question [of] fact ... as to whether this charge actually comes within that language or not." RP (11/22/02), 19:13-15. Indeed,

[15] Plaintiffs' claim that "it is undisputed that AWS' customers do not even receive the [terms and conditions] until after they start their service" is incorrect. In fact, the record shows that AWS' practice was to provide copies of the terms and conditions along with the wireless telephone at the time a customer signed up for service. Under the typical Agreement, the customer then had 30 days to cancel his or her service, without penalty. CP 3513; *see also* CP 3120. This gave ample time for any subscriber to carefully review the terms and conditions of service before they were committed to the contract.

Plaintiffs argued to the trial court that the contract was ambiguous on this very point: "[T]he contract language is clearly ambiguous because it does not come right out and say that the consumer will be charged this contribution[.]" CP 1117-18; *see also* RP (4/25/03), 5:16-23 (Plaintiffs relied on *Berg* to argue for consideration of extrinsic evidence to interpret the contract). In order to resolve this "question of fact," as Plaintiffs recognized in the trial court, the parties were *required* to resort to extrinsic evidence.

Ignoring their prior arguments to the contrary and without citation to any Washington authority, Plaintiffs now assert that extrinsic evidence is never admissible in order to interpret the meaning of a "standardized agreement." App. Br., pp. 37-39. Plaintiffs are wrong. "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Berg*, 115 Wn. 2d at 667. Under *Berg's* context rule, extrinsic evidence may be considered in order to interpret any agreement, whether or not it is ambiguous. Washington courts never have adopted a contrary rule to be applied in the case of "standardized agreements." Indeed, *Berg* has been applied in cases that involved agreements that were "standardized." *See, e.g., Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004); *Western Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 7 P.3d 861 (2000).

3. Plaintiffs' other arguments are misplaced.

Plaintiffs' entire argument regarding class certification on the

contract claims rests on the erroneous premises that an ambiguous agreement is automatically construed against the drafter as a matter of law without consideration of other extrinsic evidence. *See* CP 782-83. To the contrary, under New York law (which applies to Mr. Schnall's contract), the rule of *contra proferentem*, or construction against the drafter, is a rule of last resort that applies only when all other rules regarding contract construction (including reference to extrinsic evidence) are insufficient to resolve an ambiguity. *Albany Savings Bank v. Halpin,* 117 F.3d 669, 674 (2d Cir. 1997); *Rottkamp v. Eger,* 346 N.Y.S.2d 120, 127 (N.Y. Sup. 1973); *Herzog v. Williams,* 526 N.Y.S.2d 329, 330 (1988). Washington law is in accord on this point. *Kwik-Lok Corp. v. Pulse,* 41 Wn. App. 142, 148, 702 P.2d 1226 (1985); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt a. The court properly concluded that the need to look to extrinsic evidence precluded certification of the contract claims.

Plaintiffs themselves rely on extrinsic evidence, arguing that all subscribers who called AWS to inquire about the UCC were uniformly misled. App. Br., p. 41. Plaintiffs rely on a single internal AWS record, which they badly misconstrue.[16] In fact, to the extent this document is evidence of a consistent practice, it shows that Customer Care representatives provided subscribers the accurate information regarding

[16] The document also contains at least triple-hearsay on the point for which Plaintiffs offer it. ER 801(c). Plaintiffs repeatedly cite to portions of the record that do not support their arguments, and in many cases are inadmissible, as well. For example, Plaintiffs purport to rely on a newspaper article (which, incidentally, has nothing to do with the UCC) as proof of the "common practice" of wireless carriers. App. Br., p. 1, citing CP 83 (but apparently actually referring to CP 84-85). Defendants reserve all their objections to this "evidence."

the UCC that was contained in CCNet, the Customer Care database. *See* § II.D.5, *supra.* More important for our purposes, however, is the point that Plaintiffs *expressly* disavowed any reliance on oral misrepresentations in support of their claims: "Plaintiffs do not rely on oral representations of sales representatives. Nor could oral representations change the contract terms or effect (*sic*) plaintiffs' CPA claims." CP 41. Plaintiffs adopted this position because they understood the need to prove alleged oral misrepresentations and reliance present individual questions of fact that are fatal to their class certification motion.

Finally, Plaintiffs' argument that AWS did not introduce "actual evidence of context" as to the unnamed class members begs the point. As to Mr. Schnall, from whom AWS has been allowed to take discovery, there *is* such evidence. The same is true for the other Named Plaintiffs. Their billing statements and Customer Care records have been examined and they have been deposed to discover, among other things, whether their performance of their Agreements and any subsequent communications with AWS regarding the UCC shed light on their contract claims. It is not surprising that AWS does not have similar information regarding the millions of unnamed subscribers in the putative class, because it has not had the opportunity to take discovery of them. This is precisely the point the trial court made: "Individual inquiry would have to be made into these factors for interpretation of the terms and conditions to decide the contract claims." CP 419. As the court found, the effort required to undertake this individual inquiry as to millions of subscribers would undermine the

commonality and typicality of the claims and to lead to a predominance of individual over common questions of fact. *Id.*

C. The Trial Court Properly Concluded That, In The Context Of This Case, Plaintiffs Cannot Show That The Alleged Deception Caused Their Injury Unless They Show They Actually Were Deceived

1. Proof of causation is required by the statutory language in RCW 19.86.090.

When the Legislature enacted RCW 19.86.090, creating a private right of action for CPA violations, it provided that such claims may be asserted only by a "person who is injured in his or her business or property by a violation of RCW 19.86.020[.]" In light of this language, it is clear that a causal link between the unfair or deceptive acts and the injury suffered by plaintiff is required. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.,* 105 Wn. 2d 778, 785, 719 P.2d 531 (1986). Where the alleged violation is grounded in deception, the causal link requires that a plaintiff who seeks damages must show that she was deceived.[17]

Plaintiffs rely on cases involving public enforcement agencies, such as the Washington State Attorney General or the Federal Trade Commission. These cases are inapposite because the requirement of causation in RCW § 19.86.090 applies only to *private actions*. The causation language quoted above does not appear in RCW 19.86.080, which provides standing for the Attorney General; nor does the same

[17] Because other claims are preempted, the only viable CPA claim plaintiffs may assert is one based in deception. 20 F.C.C.R. 6448 at ¶¶ 30-32; *see also* CP 1053-56 (Plaintiffs don't challenge reasonableness of AWS' practices, only alleged deception.)

requirement apply to the FTC when that agency brings a claim on behalf of injured consumers (*see* discussion, § III.C.3.a, *infra*). *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 113, 22 P.3d 818 (2001) ("The standard for a private right of action differs from an action by the State under the CPA."); *Nuttall v. Dowell,* 31 Wn. App. 98, 110, 639 P.2d 832 (1982).

2. Washington authority, both before and after *Hangman Ridge,* requires proof of reliance in this type of case.

a. *Nuttall* is the only Washington authority that is directly on point.

In finding that individual proof of causation was required in this case, Judge North relied on *Nuttall v. Dowell, supra.* CP 421-22 ("The requirement of a causal link is persuasively set forth" in *Nuttall*). Like this case, *Nuttall* involved a private CPA damages claim based on an alleged misrepresentation. The *Nuttall* court held that "a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it." 31 Wn. App. at 111.

Nuttall was cited with approval in *Hangman Ridge,* when the Supreme Court clarified the requirement of causation for private CPA plaintiffs. 105 Wn. 2d at 793. More recently, the Supreme Court described *Nuttall* as "the only Washington authority that is directly on point (i.e., dealing with a money damages claim based on misrepresentation)." *Pickett v. Holland Am. Line-Westours, Inc.,* 145 Wn. 2d 178, 196, 35 P.3d 351 (2001) ("*Pickett II*"). *Nuttall* is still good law in Washington, and its holding makes eminent good sense. If the

alleged violation is deception, how can a plaintiff argue that he suffered injury *by reason of* the alleged violation unless he was deceived?

Plaintiffs are wrong when they argue that *Nuttall* was overruled by *Pickett v. Holland Am. Line-Westours, Inc.,* 101 Wn. App. 901, 6 P.3d 63 (2000) ("*Pickett I*") and *Eastlake Const. Co., Inc. v. Hess,* 102 Wn. 2d 30, 686 P.2d 465 (1984). App. Br., pp. 24-25. *Pickett I* considered whether a class action settlement was reasonable in light of various issues, including the difficulty of proving causation on the class-wide CPA claims. Relying on *Edmonds v. John L. Scott Real Estate,* 87 Wn. App. 834, 942 P.2d 1072 (1997) and *Mason v. Mortgage America, Inc.,* 114 Wn. 2d 842, 792 P.2d 142 (1990), the Court held in the context of the claims *in that case* that causation might be established by proof that each plaintiff lost money because of unlawful conduct, without individualized proof that he was induced to purchase a cruise ticket by the purportedly deceptive acts. 101 Wn. App. at 920.

Contrary to Plaintiffs' argument, however, the Supreme Court disagreed with the *Pickett II* analysis of causation. *Pickett II,* 145 Wn. 2d at 196-198. Citing *Nuttall,* the Supreme Court first confirmed that a private claim under the CPA requires proof of a causal link between the unfair or deceptive acts and the injury allegedly suffered by plaintiff. *Id.* In overruling *Pickett I,* the Supreme Court found that neither of the cases relied on by the Court of Appeals stands directly for the proposition for which it was cited. *Id.* In *Edmonds*, 87 Wn. App. 834, for example, the claimant did in fact rely on representations made by the defendant in

buying a house. In *Mason*, 114 Wn. 2d 842, "the issue of causation never even arose" and the discussion in that case was limited to the question of injury rather than causation. 145 Wn. 2d at 197. Because of the procedural posture of *Pickett II*, the Supreme Court did not need to resolve the question as to whether proof of reliance was required under the facts of that case, but it held that the settlement was reasonable in large part because the lack of proof on this point "presented a risk to the Plaintiff class favoring settlement." *Id.* at 198. Thus, in *Pickett II*, the Supreme Court cited *Nuttall* with approval and carefully distinguished the cases on which the *Pickett I* court relied. In *Pickett II* the Supreme Court disagreed with the *Pickett I* reasoning on causation/reliance.[18]

Plaintiffs' argument that *Eastlake* overruled *Nuttall* is simply puzzling. The *Eastlake* Court did not even mention *Nuttall* because causation was not an issue in *Eastlake.* Rather, the issue in *Eastlake* was whether the plaintiff could satisfy the three-part "public interest" requirement for a private CPA claim established in *Anhold v. Daniels*, 94 Wn. 2d 40, 45-46, 614 P.2d 184 (1980); *Eastlake*, 102 Wn. 2d at 51-52.[19]

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[18] This disposes of Plaintiffs' argument that *Pickett I* is controlling. Plaintiffs cite to a Wisconsin case, *Peace Lutheran Church and Academy v. Village of Sussex*, 631 N.W.2d 229 (2001). But the same Wisconsin courts have recognized that they are not bound to follow an appellate court's reasoning where it has been implicitly or explicitly disapproved by a higher court. *Spencer v. County of Brown,* 573 N.W.2d 222 (Wis. App. 1997).

[19] The *Anhold* test was replaced in *Hangman Ridge,* at the same time the Supreme Court clarified the requirement that a private CPA plaintiff must establish a causal link between her injury and the alleged violation. 105 Wn. 2d at 784-85.

b. Post-*Hangman Ridge* cases confirm that the "causal link" in a private CPA claim based on deception includes proof that the plaintiff was misled.

Decisions subsequent to *Hangman Ridge* affirm the need for a "causal link" between an alleged violation and the plaintiff's injury. In claims based on alleged deception, the Supreme Court always has required the plaintiff to show that he was misled to his detriment. In *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn. 2d 396, 759 P.2d 418 (1988), a private plaintiff brought a CPA claim after he bought an allegedly defective horse at an auction. The Court held:

> [W]e find substantial evidence the fifth element of *Hangman* which requires "that a causal link be established between the unfair or deceptive act complained of and the injury suffered" is satisfied. . . . [T]here was evidence the sellers' representations had induced [plaintiff] to come to the sale and purchase [the horse] for $25,000. Other evidence indicated [he] had intended to use the colt as a racehorse but that [it] was unsound and could not safely carry a rider. There is substantial evidence of a causal link between "the unfair or deceptive act complained of" the sellers' representations, and "the injury suffered[.]"

Id. at 407.

Two years later, in *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn. 2d 148, 167, 795 P.2d 1143 (1990), the court clarified that "the causal link must exist between the *deceptive act* [in this case, an inflated appraisal] and the *injury suffered*." *Id.* (emphasis in original); s*ee also Washington State Physicians In. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 314, 858 P.2d 1054 (1993) (jury was properly instructed that it had to find that the unfair or deceptive act or practice was the proximate

cause of plaintiff's injury); *Robinson,* 106 Wn. App. at 113.

The evolution of the case law in Washington with respect to private CPA claims pursuant to RCW 19.86.090 shows that the courts always have heeded the language of the statute itself. Where a private CPA plaintiff claims that he suffered injury as a result of a deceptive act, he must show that he was induced to rely on the deception and therefore lost money that he would not have lost but for his reliance.

3. Relevant federal authority contradicts, rather than supports, Appellants' argument regarding reliance.

a. Consumer redress actions by the FTC do not involve the same issues presented here.

The Washington Legislature has directed that, in construing the CPA, "the courts [should] be guided by final decisions of the federal courts and final orders of the [F]ederal [T]rade [C]ommission interpreting the various federal statutes dealing with the same or similar matters[.]" RCW 19.86.920. As discussed above, the causation requirement in private CPA claims arises not from the definition of unfair or deceptive practices in RCW 19.86.020, but rather in the section of the statute that created a private right of action, RCW 19.86.090. Thus, Appellants' reliance on cases involving the Federal Trade Commission Act is misplaced, because the Federal Trade Commission Act does not authorize private actions for damages and has no provision parallel to RCW 19.86.090. *See Naylor v. Case and McGrath, Inc.,* 585 F.2d 557, 561 (2d Cir. 1978).

b. The most analogous federal statute is 18 U.S.C. § 1964(c).

The most analogous federal statute on the causation issue is 18 U.S.C. § 1964(c), which provides a private right of action for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In fact, the language of 18 U.S.C. § 1964(c) is in all pertinent respects identical to the language of RCW 19.86.090.[20] Both statutes were closely modeled on the civil action provision of the federal antitrust laws, Section 4 of the Clayton Act (15 U.S.C. § 15). *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992).

In *Holmes*, the Supreme Court held that a plaintiff's right to sue under § 1964c requires a showing that the defendant's violation not only was a 'but for' cause of plaintiff's injury, but was the proximate cause as well. *Id.* at 268. After *Holmes*, a number of federal courts have analyzed what proof of causation is necessary for a private RICO plaintiff alleging injury from misrepresentation. The vast majority of these cases have held that, where claims are based on misrepresentation, the plaintiff must prove that he relied on the alleged misleading statements.

> We therefore now hold that in order to prevail in a civil RICO action predicated on any type of fraud, including bank fraud, the plaintiff must establish "reasonable reliance" on the defendants' purported misrepresentations

[20] 18 U.S.C. § 1964(c) provides, "Any person injured in his business or property by reason of a violation of [the statute] may sue therefore . . ." while the relevant portion of RCW 19.86.090 states, "Any person who is injured in his or her business or property by a violation of [the statute] may bring a civil action . . ."

or omissions.

Bank of China v. NBM LLC, 359 F.3d 171, 178 (2d Cir. 2004). The Second Circuit in *Bank of China* noted that "[s]everal of our sister Circuits have concluded that where common law, wire or securities fraud are the predicate acts for a civil RICO action, the plaintiff must establish "reasonable reliance."[21]

4. The trial court acted well within its discretion when it found that individualized proof of causation is necessary in this case.

As discussed above, accurate information was widely disseminated to AWS' subscribers regarding "taxes, surcharges, other charges and fees," in general, and the UCC, in particular. This information came from AWS, the FCC, state governmental agencies, other carriers, and news reports. *See* discussion, §§ II.D, II.E, *supra*. Under these circumstances,

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[21] *Id.* at 177; *see Summit Props. Inc. v. Hoechst Celanese Corp.,* 214 F.3d 556, 562 (5th Cir. 2000) ("when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation"); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.,* 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts."); *Caviness v. Derand Res. Corp.,* 983 F.2d 1295, 1305 (4th Cir.1993) ("claim under [civil] RICO requires both reliance and damage proximately caused by the violation"); *Sikes v. Teleline, Inc.,* 281 F.3d 1350, 1361-64 (11th Cir. 2002) (reversing Rule 23(b)(3) class certification of a civil RICO claim in part because the district court erred in presuming reliance). At least one federal case holds that reliance by plaintiff itself is not required. *Systems Management, Inc. v. Loiselle,* 303 F.3d 100 (1st Cir. 2002). A close reading of this case shows, however, that plaintiff claimed it suffered injury because defendant misled some third party and that the third party in turn took some action that harmed plaintiff. *Id.* The U.S. Supreme Court faced the third-party reliance issue in *Anza v. Ideal Steel Supply Corp.,* __ U.S. __, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006) but did not resolve whether §1964c requires proof of reliance by the plaintiff, itself, because it found that the plaintiff's theory of causation was too remote in any event and therefore affirmed dismissal of its claims under FRCP 12(b)(6). *Id.* at 1998.

it would be particularly difficult to accept Plaintiffs' unsupported allegation that *every subscriber* who paid the UCC necessarily was misled as to the nature of the charge and would not have been an AWS customer if he had known the truth.

Judge McKeown's opinion for the Ninth Circuit in *Poulos v. Caesar's World, Inc.*, 379 F.3d 654 (9th Cir. 2004) is very instructive on this issue. In that case, which arose under 18 U.S.C. § 1964(c), plaintiffs appealed an order denying class certification where, as here, the trial court had found that the need to prove individualized reliance on the predicate RICO acts of fraud meant that plaintiffs could not establish the predominance and superiority requirements of FRCP 23(b)(3). 379 F.3d at 658. The Ninth Circuit affirmed the trial court:

> Causation lies at the heart of a civil RICO claim. Lumping claims together in a class action does not diminish or dilute this requirement. It is well settled that to maintain a civil RICO claim predicated on mail fraud, a plaintiff must show that the defendant's alleged misconduct proximately caused the injury.

Id. at 664. In *Poulos,* as in this case, the putative class members were likely to be very different from one another in terms of their knowledge, experience and expectations relating to the alleged misrepresentations. *Id.* As such, it was not possible to conclude as a matter of law that each consumer was misled to her detriment. While the court refrained from announcing a black-letter rule that individualized "reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud", it found that such reliance was required under the facts of that

case: "[R]eliance provides a key causal link between the . . . alleged misrepresentations and the Class Representatives' injury. . . . In this case, individualized issues related to plaintiffs' knowledge, motivations, and expectations bear heavily on the causation analysis." *Id.* at 665, 666.

There will be other cases, with different facts, in which plaintiffs may be able to show causation without individualized proof of reliance. For example, a presumption of reliance may be appropriate if the record showed that a defendant successfully suppressed all truthful information about its product, or if the product is so defective that, if the truth were known, no reasonable consumer would purchase it. In such cases, unlike here, the trial court might find it appropriate to litigate the damages claims of all customers in a class-wide trial. In this case, however, there simply is no basis to conclude that *every* AWS subscriber was misled as to her obligation to pay the UCC. A class-wide trial under these circumstances runs the substantial risk of giving a windfall to millions of consumers who were fully informed and paid the UCC freely and voluntarily, based on the incorrect conclusion that they were misled.

It cannot be argued that reliance is *never* required in a CPA case based on alleged deception. The trial court was well within its discretion when it found that individualized proof of reliance was needed on these facts.

5. The *Affiliated Ute* theory is inapplicable here.

In a last ditch effort to avoid the need to prove reliance, Plaintiffs try to recast their claims of misrepresentation as omissions, arguing that

reliance is never required in such cases. They rely on a Washington case under the Franchise Investment Protection Act, RCW 19.100.010, *et seq.* ("FIPA"), *Morris v. International Yogurt Co.,* 107 Wn. 2d 314, 729 P.2d 33 (1986). *Morris,* in turn, relies on a case brought under the federal securities laws, *Affiliated Ute Citizens v. U.S.,* 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972). The *Affiliated Ute* theory is inapplicable here, for a number of reasons. First, even if it otherwise applied, the presumption of reliance allowed by *Affiliated Ute* applies only in cases of pure omissions, not in cases in which the claim is based on a mix of omissions and alleged affirmative misrepresentations. *Poulos,* 379 F.3d at 666-67. Second, *Morris* does not hold that proof of reliance is irrelevant, it simply holds that it may be appropriate in *certain* non-disclosure cases arising under the FIPA to shift the burden of proof on reliance by applying a "rebuttable presumption." 107 Wn. 2d at 328-29. Shifting the burden does nothing to solve the problem of predominance in the context of class certification, however. Whether plaintiffs or defendants have the ultimate burden of proof, it remains an individualized question of fact that predominates over common questions. In order for Plaintiffs to satisfy the requirement of causation in this case, the Court would need to apply an irrebuttable presumption that every putative class member relied on the alleged misrepresentations. That cannot be done without rewriting RCW 19.86.090 to eliminate the "causal link" requirement.

6. Choice of law issues on the "consumer protection" claims also make the proposed nationwide class unmanageable.

AWS respectfully submits that the trial court erred in its conclusion that the Washington CPA applied to the claims of all members of the putative class, regardless of their residence.[22] A proper choice-of-law analysis for the CPA claims requires an examination of a number of factors that are particular to each subscriber. Although the court properly denied class certification notwithstanding this error of law, the proper choice-of-law analysis will result in application of the law of the subscriber's home state, especially where the subscriber purchased service in that state. This, in turn, creates another compelling reason that denying class certification as to the CPA claims was appropriate.

As discussed above, virtually every Subscriber Agreement during the putative class period included a choice-of-law provision. Most such provisions chose the law of the state associated with the subscriber's phone number. This choice-of-law provision is an important factor in determining which state has the most significant relationship to the CPA claims. *See Haberman v. WPPSS,* 109 Wn. 2d 107, 159, 744 P.2d 1032 (1987). For example, the fact that Mr. Schnall entered into an Agreement that called for application of New York law to his contract is a strong

[22] Because the trial court's decision to apply Washington's CPA to all claims would constitute error prejudicial to Defendants if it were repeated in a possible remand, Defendants filed a Notice of Cross Appeal as to the trial court's denial of their motion for summary judgment on Mr. Schnall's CPA claim. *See* CP 748-52. Without waiver of any arguments, Defendants have determined not to pursue a cross appeal as to the trial court's denial of summary judgment dismissing Mr. Schnall's breach of contract claim.

indicator that he and AWS anticipated that New York law would apply to non-contract claims such as these that are so closely related to and arise out of the contractual relationship.[23] *Id.*; *see also Kammerer v. Western Gear Corp.*, 96 Wn. 2d 416, 423, 635 P.2d 708 (1981).

In deciding that Washington law applied to all subscribers' claims, the trial court relied primarily on RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145. CP 421. Section 145 states general principles that apply to all torts, to greater or lesser degrees, but makes it clear that the rules in other sections are intended to deal with "particular torts as to which it is possible to state rules of greater precision." *Id.*, cmt. a. Where, as here, misrepresentation claims are involved, more precise rules in § 148 govern the choice-of-law analysis:

> When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 148(1). The contacts to be considered in determining which state has the most significant relationship in situations where the alleged misrepresentations and the reliance are in different states include: (1) where the reliance occurs;

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[23] In addition, Mr. Schnall lived in New Jersey, where he "relied" on the alleged misrepresentations and where he entered the contract, which was to be performed primarily in New York. CP 748-753; 755-776; 909-914; 977-980.

(2) where the representations were received; (3) where the representations were made; and (4) where the parties reside. *Id.,* § 148(2). These contacts will often call for application of the law of the subscriber's home state, especially where the subscriber was in her home state when she activated service.

Judge North's conclusion that Washington had the most significant contact was based in large part on the fact that AWS was headquartered in Washington and the practices challenged herein supposedly originated at headquarters. However, in a claim based on misrepresentation, "the domicil, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant." *Id,* § 148 cmt. i.

Kammerer v. Western Gear Corp., supra, is a very similar case and applies here. In *Kammerer,* defendant was a Washington corporation that manufactured certain equipment in a plant in Everett, Washington, although it also had substantial manufacturing capacity in California. The contract in that case, unlike here, was entered into in both states, i.e., it was signed in California by plaintiffs and apparently mailed to Washington for signature by the defendants. Nonetheless, California was where the parties negotiated and the alleged fraudulent representations were made. Suit was filed in Washington and, applying the Restatement, this Court found that the most significant relationship was with California and thus California law applied to the misrepresentation claims. (*See Kammerer v. Western Gear Corp.,* 27 Wn. App. 512, 514-15, 618 P.2d

1330 (1981) for discussion of relevant facts.) The Washington Supreme Court affirmed because "[d]efendant chose to go to California to negotiate its contract; the fraudulent representations were made in California; the parties agreed California law would apply." *Kammerer,* 96 Wn. 2d at 423.

It is important to keep in mind that the claims at issue arose for the most part from contracts entered into outside Washington by residents of other states regarding services that were to be performed primarily in that other state. To the extent these non-Washington residents relied on any representations or alleged misrepresentations in entering into the Agreements, they received those representations and acted on them outside Washington. Other states have a significant interest in protecting consumers from alleged misrepresentations that occur there. "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone, Inc.,* 288 F.3d at 1018; *see also Kammerer, supra.* There is no basis to apply the Washington CPA to the claims of millions of AWS subscribers who purchased and used wireless services in other states.

The cases cited by Judge North do not support his conclusion. *Demitropoulos v. Bank One Milwaukee, N.A.,* 915 F. Supp. 1399 (N.D. Ill. 1996) involved a contractual choice-of-law provision that elected the law of the state in which the defendant was located. In *Steed Realty v. Oveisi,* 823 S.W.2d 195 (Tenn. App. 1991), the court applied Tennessee law because the defendant had advertised in Tennessee and the real estate

closing at issue took place in Tennessee. Finally, *Lony v. E.I. DuPont de Nemours and Co., Inc.,* 821 F. Supp. 956 (D. Del. 1993) involved a question of standing, rather than choice of law. As to the latter, an earlier decision in the case by the Third Circuit on a *forum non conveniens* dismissal had applied the law of West Germany (where the alleged negligent misrepresentations were received) to the negligent misrepresentation claims, notwithstanding that they apparently "originated" in Delaware at defendant's headquarters. Only as to the claim for intentional misrepresentation did the court find that Delaware law applied. *See Lony v. E.I. DuPont,* 886 F.2d 628, 643 (3d Cir. 1989).

D. The Trial Court Properly Denied Class Certification Due To Commonality And Typicality Problems Stemming From AWS' Affirmative Defenses

AWS asserted several affirmative defenses that the trial court properly concluded are not susceptible to class-wide resolution: (1) the voluntary payment defense; and (2) the obligation to submit these claims to arbitration pursuant to most of the putative class members' Agreements.

Many states recognize some form of voluntary payment doctrine, although the law varies substantially from state to state. As discussed above, the sheer magnitude of construing the laws of up to 50 states on this issue precludes class-wide litigation. Under Illinois law, for instance, a plaintiff who has paid a disclosed charge has virtually no chance of challenging the charge, unless he or she can prove that the payment was coerced. *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1329-30 (Ill.

App. 1995).[24]

In New York, however, the voluntary payment defense requires more. The defendant has to demonstrate that the plaintiff paid the money "with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge[.]" *Clarke v. Dutcher*, 9 Cow. 674 (N.Y. Sup. 1824); *accord Gimbel Bros. v. Brooks Shopping Ctrs.*, 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986). Thus, to determine whether the voluntary payment doctrine bars the claims of New York law subscribers like Mr. Schnall will require consideration of the circumstances, including the subscriber's state of mind at the time he paid his monthly bills, the manner in which the UCC was disclosed in the subscriber's bills (*see* § II.D.1, *supra*); whether he received any other express notice regarding the UCC (e.g., the August 2000 bill notice); his conduct with respect to reviewing the bills and either paying or questioning the charge; whether he renewed or extended service with AWS after knowing of the UCC; and evidence of his reaction when the UCC was "disclosed" to him. Even if the choice-of-law problems on this defense were surmountable (they are not), application of the voluntary payment doctrine presents individual questions of fact that overwhelm any common issues present in the case.

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[24] The test is somewhat different under Florida and California law – the laws that would govern the claims of Named Plaintiffs here. In those states, courts ordinarily preclude a challenge to a bill voluntarily paid "unless the circumstances present some constraint or compulsion of such a degree as to impose a necessity of payment sufficient to overcome the mind and will of a person of ordinary firmness." *Hassen v. Mediaone of Greater Fla., Inc.*, 751 So. 2d 1289, 1290 (Fla. App. 2000); *see also McLain Western #1 v. County of San Diego*, 146 Cal. App. 3d 772, 776, 194 Cal. Rptr. 594 (1983).

The same arguments apply to an even greater degree regarding the enforceability of the arbitration clause. Two of the plaintiffs in this case were successful in convincing the trial court that their particular agreements to arbitrate were unenforceable under Washington law. CP 423-25. However, in other Washington cases, the court has reached a different conclusion with regard to more recent versions of the AWS arbitration clause. *See, e.g., Udlinek v. AT&T Wireless Services, Inc.*, KCSC No. 04-2-04745-5 SEA (June 9, 2004); *Drake v. AT&T Wireless Services, Inc.*, KCSC No. 04-2-36050-1 SEA (September 8, 2005); *see also Scott v. Cingular Wireless LLC*, KCSC No. 04-2-04205-4 KNT (September 10, 2004). Thus, even as to Washington class members, the issue would require detailed analysis of each subscriber agreement.[25]

Other states will enforce binding arbitration provisions in consumer contracts. *See, e.g., Fonte v. AT&T Wireless Services, Inc.*, 903 So.2d 1019 (Fla. App. 2005); *Parker v. Green Tree Fin. Corp.*, 730 So.2d 168 (Ala. 1999); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999) (Pennsylvania); *Vincent v. Neyer*, 745 N.E. 2d 1127 (Ohio App. 2000). Still others, as of now at least, have declined to enforce many consumer arbitration clauses. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). Because all AWS Subscriber Agreements after July 1999 contained arbitration clauses that cover claims arising from the service relationship, whether pleaded in contract or otherwise, these

[25] Typically, subscribers enter into a new agreement each time they receive a new handset, so a single subscriber might be subject to several different arbitration agreements.

differences in state laws will have a profound effect on the course of many putative class members' claims.

Resolution of this issue in a nationwide class action would require application of the laws of 50 states to the various arbitration clauses. In many states, the appropriate state law of unconscionability requires consideration of all facts and circumstances particular to the individual contracting party. *See Haun v. King*, 690 S.W.2d 869, 872 (Tenn. App. 1984); *Brenner v. Little Red Sch. House*, 274 S.E.2d 206, 210 (N.C. 1981); *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 771-72 (Ga. 1996) (factors to be examined include "the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice" of vendors). These issues cannot be resolved unless evidence of each subscriber is available to the trier of fact.

E. The Trial Court Properly Denied Certification Of A "CPA Liability Class"

Two years after Judge North denied their motion for class certification, Plaintiffs tried to repackage their unsuccessful arguments in a second motion, this time seeking a "CPA liability class." CP 602-612. As they did in their Brief here, in this second motion Plaintiffs mischaracterized Judge North's rationale. The court did not deny class certification merely because individualized proof was needed to prove *damages*. Instead, the court correctly ruled that individual proof was

needed in this case to establish *causation* and *injury*. CP 422. This distinction is critical because causation and injury are two of the essential elements of CPA *liability*. Thus, a trial on behalf of Plaintiffs' "CPA liability class" would not resolve the question of liability as to *any* individual class member because it would leave unresolved two essential elements of CPA liability.

AWS' affirmative defenses – the voluntary payment defense and the arbitration issue – would also need to be resolved in a liability-only trial.[26] But, "the need to separately analyze AWS' affirmative defenses in light of the law of each of the 50 states undermines the commonality and typicality of the plaintiff class' claims and makes a class action unmanageable." CP 420. Moreover, because the proposed liability-only trial would not resolve the issue of liability as to any particular class member, separate "mini-trials" would be required. Yet the court found that individual trials on each of these claims would be unmanageable. CP 422. Plaintiffs offer no specific suggestions as to how the remaining questions would be resolved as to each of the millions of subscribers who are potential members of their "CPA liability class."

Plaintiffs rely solely on *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). But other recent decisions of this

[26] Although the trial court analyzed the voluntary payment defense only in the context of the contract claims, there is no reason the same defense would not apply to the CPA claims. *Speckert v. Bunker Hill Arizona Min. Co.*, 6 Wn. 2d 39, 52, 106 P.2d 602 (1940); *see also Robinson*, 106 Wn. App. at 122 (where voluntary payment defense was raised in a CPA claim, the court did not need to resolve the issue on the merits because it found no misrepresentation).

Court are inconsistent with S*itton* as to the very point (predominance) for which Plaintiffs rely on it. *See, e.g., Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003); *Oda*, 111 Wn. App. 79. *Schwendeman*, for example, upheld denial of class certification in a case challenging the defendant's policy of designating non-OEM parts pursuant to a replacement parts program. Notwithstanding the presence of significant common questions of fact, the court found that plaintiffs had failed to establish predominance of the common questions, because (as in this case) "the class claims require consideration of so many variables that the questions are more individualized than common to all class members." 116 Wn. App. at 23. The court also found the proposed class was unmanageable. *Id.* at 29.

Sitton acknowledged that certification of a CPA liability class is not appropriate with respect to every CPA claim. Indeed, the *Sitton* court distinguished a number of cases in which class certification had been denied because the claims in those cases differed from the claims in *Sitton.* 116 Wn. App. at 254 n.18. The issue of predominance involves "a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." *Id.* at 255 (internal quotations omitted). This necessarily involves a careful analysis of the type of claims asserted, as well as the evidence that will be used to prove these claims and to defend against them. Applying this analysis, it is clear the predominance analysis here is very different. The *Sitton* plaintiffs did not base their claims solely (or even primarily) on deception. They claimed

that their insurer's claims review process was created and applied in bad faith for purposes of denying legitimate claims for personal injury benefits. *Id.* at 249. The critical factual issue in *Sitton* thus turned on the *defendant's* state of mind, which made resolution of the issue on a class-wide basis appropriate.

In contrast, AWS' state of mind is irrelevant to Plaintiffs' CPA claims, which are based on alleged deception. *See Hangman Ridge,* 105 Wn. 2d at 785. As the trial court properly found, the key issue here is whether or not any individual consumer was misled regarding the UCC. This case turns on the *plaintiffs'* state of mind, which necessarily involves individualized proof.

Finally, Plaintiffs' argument that the court should have certified a four-state class is misplaced. App. Br., p. 46. Plaintiffs never moved for such a class so the trial court never ruled on whether or not this approach would avoid the problems that precluded class certification of the nationwide class. *See Spence v. Glock,* 227 F.3d at 313 (failure to provide court with a workable subclass plan fatal to certification). While applying the law of four different states may be marginally less problematic than applying the law of 50 different states, the choice-of-law issue still presents serious challenges to a class-wide trial. *Jim Moore Ins. Agency v. State Farm Mut. Auto. Ins. Co., Inc.,* 2003 WL 21146714 at *10 (S.D. Florida 2003) (variations in state law (5 states) militate against a predominance finding). Moreover, the need for individualized proof that precluded certification of the class on a nationwide basis would also

preclude the proposed four-state class. *See* discussion §§ III.B.2, III.C, *supra*.

V. CONCLUSION

The trial court did not abuse its discretion when it denied class certification in this case, based on its careful analysis of the claims and evidence in the lengthy record.

DATED this 12 day of August, 2006.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 14TH day of August, 2006, I caused to be served a true and correct copy of the foregoing *Brief of Respondent and Cross-Appellant* by method indicated below and addressed to the following:

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